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No. 00-1903

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL, and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of California

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 203,000 builder and associate members throughout the United States, including more than 5,700 members in the state of California. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes, particularly when such remedies are in any way obstructed by a state court.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S.

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ---, 121 S.Ct. 2448 (2001).

SUMMARY OF ARGUMENT

The California Supreme Court has erroneously held, contrary to the clear decisions of this Court and the acknowledgment of numerous state courts, that state remedies must be exhausted before someone can bring a claim under 42 U.S.C. § 1983.

In addition, the California court has unsoundly determined that current and prospective tenants must bear the entire burden to make whole a property owner who suffers economic injury due to both unjustifiably low rent control limits and violations of the property owner's procedural and substantive due process rights.

REASONS FOR GRANTING THE WRIT

I. NO STATE COURT MAY PLACE PROCEDURAL, ADMINISTRATIVE OR LEGAL ROADBLOCKS REQUIRING EXHAUSTION OF ANY ALLEGEDLY AVAILABLE REMEDIES IN THE WAY OF A CLAIM BROUGHT UNDER 42 U.S.C. § 1983.

Almost two decades ago this Court, after considering a host of judicial precedent and legislative intent going back to 1871, determined that no state could impose any type of exhaustion requirement upon a party claiming a violation of federal constitutional rights under 42 U.S.C. § 1983.

> I fully agree with the Court that our frequent and unequivocal statements on exhaustion cannot be explained or distinguished away as the Fifth Circuit attempted to do. For nearly 20 years and on at least 10 occasions, this Court has clearly held that no exhaustion of administrative remedies is required in a § 1983 suit.

Patsy v. Board of Regents, 457 U.S. 496, 517 (1982)(White, J., concurring).

Indeed, even members of the Court with some sympathy for the lower court's decision reached the same inescapable conclusion. "[While] considerations of sound policy suggest that a § 1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint. . . : this Court already has ruled that, in the absence of additional congressional legislation, exhaustion of administrative remedies is not required in § 1983 actions." *Id.* (O'Connor and Rehnquist, JJ., concurring).

In rejecting a notice of claim requirement imposed by Wisconsin six years after the *Patsy* decision, this Court further noted that even a procedure that "does not involve lengthy or expensive administrative proceedings [yet] forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place" was insupportable. *Felder v. Casey*, 487 U.S. 131, 147 (1988). "[T]he notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action in state court" is "utterly inconsistent with the remedial purposes of [§ 1983]." *Id.*

The Wisconsin Supreme Court unanimously accepted this Court's decision as the definitive statement of law regarding exhaustion requirements and § 1983. "The [U.S. Supreme Court's *Felder* opinion] very strongly, convincingly, and clearly asserts that a state court may not impose an exhaustion requirement in a sec. 1983 action." *Casteel v. Vaade*, 481 N.W.2d 476, 480 (Wis. 1992).

The Wisconsin Supreme Court was joined by a host of other state courts in recognizing the unequivocal statement of this court that no exhaustion requirement of any kind may be applied to a § 1983 claim.[2]

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[2] *See, e.g., Diedrich v. City of Ketchikian*, 805 P.2d 362 (Alaska 1991); *Zeigler v. Kirschner*, 781 P.2d 54 (Ariz.Ct.App.1989); *Arkansas State Medical Bd. v. Leipzig*, 770 S.W.2d 661 (Ark. 1989); *Patel v. Thomas*, 793 P.2d 632 (Colo. Ct. App.1990); *Miller v. District of Columbia*, 587 A.2d 213 (D.C. 1991); *Howlett v. Rose*, 571 So.2d 29 (Fla. Dist. Ct. App. 1990); *Allen v. Bergman*, 400 S.E.2d 347 (Ga. Ct. App. 1990); *Brumage v. Woodsmall*, 444 N.W.2d 68 (Iowa 1989); *Prager v. State Dept. of Revenue*, 20 P.3d 39 (Kan. 2001); *McGehee v. DePoyster*, 708 So.2d 77 (Miss. 1998); *Blackwell v. City of St. Louis*, 778 S.W.2d 711 (Mo. Ct. App.1989), *cert. denied*, 494 U.S. 1067 (1990); *Gibney v. Toledo Board of Education*, 532 N.E.2d 1300 (Ohio 1988).

Yet despite this sea of precedents, the California Supreme Court ordered the Gallands to return to the administrative process crafted by the Clovis bureaucracy, before any § 1983 claim could be raised.

That this decision is legally insupportable is clear. What makes it even more egregious is that the California Court *recognized* that the City of Clovis led the Gallands into a rent control "Twilight Zone:"

> Neither the [City's rent control] Ordinance nor any implementing regulations made clear precisely how the Gallands were to obtain a rent increase. This regulatory vacuum was filled by an ad hoc proceeding marked by Clovis's shifting, costly, and at times ill-considered requests for information. As a result, the Gallands lacked a timely and affordable means by which to seek rent increases.

Galland v. City of Clovis, 24 Cal.4th 1003, 1037 (2001).

Not all members of the California Court failed to grasp this Court's clear statements of law on exhaustion of state remedies, or the unequivocal existence of a due process violation in the present case. "We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure. . . ." *Id.* at 1046 (Brown, J., dissenting).

While erecting state administrative barriers to § 1983 has the potential to impact all citizens, Justice Brown's dissent noted another sinister aspect to this decision. "The real mischief of the majority's opinion lies in its disparate treatment of property rights when enforcing Section 1983.

. . . The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, no partiality among its protections of liberty." *Id.* at 1056 (Brown, J., dissenting).

This Court must set the legal record straight. It should grant certiorari to reaffirm that no administrative hurdles must be overcome before a § 1983 claim may be heard. For while property rights may have been the victim here, all constitutional rights that may be vindicated through § 1983 are now at risk.

II. THE CALIFORNIA SUPREME COURT'S REMEDY MISTAKENLY REQUIRES PRESENT AND FUTURE TENANTS TO PAY FOR THE GOVERNMENT'S UNCONSTITUTIONAL ACTIONS.

NAHB has played an integral role in increasing affordable housing for low-income people since its inception. Many of its members, both nationally and in California, construct multifamily buildings, including government-subsidized housing. Therefore, as NAHB works to ensure an affordable housing market exists for buyers, it works to ensure an affordable rental market exists for those who lease their homes.

The California Supreme Court has erroneously set up a procedure that fails to exact compensation from the offending party. *Cf. National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988) (Explaining that in a § 1983 action "liability attaches only to those wrongdoers 'who carry a [state] badge of authority . . .'") (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). By granting certiorari in this matter, this Court could remove a financial burden that the court below placed on a segment of society that can not afford it. The

California majority provides that after the superior court has decided that the government's denial of a rent increase is confiscatory, then the government should allow an increase in future rents to compensate for the unconstitutional confiscatory rents and administrative costs that have been borne by a landlord. *Galland*, 24 Cal.4th at 1023-24, 1028.

The remedy, however, lays all the costs of the government's unconstitutional and wasteful activities on present and future tenants. The California majority's reasoning is that increasing future rent places the burden of compensating the landlord on those who have most benefited from the confiscatory rents. *Galland*, 24 Cal.4th at 1029, n. 5. The court, however, failed to fully analyze the effects of its remedy.

The California Supreme Court refers to its remedy as a "*Kavanau* adjustment." *Galland*, 24 Cal.4th at 1008. In *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761 (1997), the court held that a landlord can not maintain an action for a 5th Amendment Taking when the government illegally denies rent increases for a number of years. Instead, a landlord must, after obtaining a court decision declaring the denials unlawful, request an increase in future rents to offset its historical losses.

The *Kavanau* court cited *California v. Levi Strauss & Co.*, 41 Cal.3d 460 (1986) and *Blue Chip Stamps v. The Superior Court of Los Angeles County*, 18 Cal.3d 381 (1976) to support its reasoning for placing the financial burden on the present and future tenants. *Kavanau*, 16 Cal.4th at 784. In both of those class action cases, the courts discussed the concept of "fluid recovery."[3] In *Galland*, the California Supreme Court inverted and muddled the concept of fluid recovery in formulating its remedy.[4] In doing so, it ignored two purposes of fluid recovery: to remove illegal earnings from a wrongdoer and to deter future unlawful conduct. *Levi Straus*, 41 Cal.3d at 472; *Simer v. Rios*, 661 F.2d 655, 676-7 (7th Cir. 1981), *cert. denied* 456 U.S. 917 (1982).

First, the remedy chosen by the California Supreme Court requires present and future rent controlled tenants to pay compensation. These tenants are not wrongdoers, and they should not incur any financial burden due to the government's unconstitutional activities. Second, by placing the entire financial burden on present and future tenants the California Supreme Court's remedy allows the government to continue imposing confiscatory rents, in an unfair manner, knowing that its actions will not result in any retribution. *Galland*, 24 Cal.4th at 1028 ("If the trial court reaffirms that the rent ceilings were confiscatory . . ., then the matter would generally be remanded to the

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[3] Under a "fluid recovery," a class action defendant pays its total liability into a fluid recovery fund. Subsequently, class members may collect their shares by proving their claims. Afterward, the remainder of the fund is distributed in some fashion approved by the court. One method of ensuring that the remainder does not revert to the wrong doer is to decrease the defendant's future prices to make up for illegally high past prices. This type of remedy is appropriate, for example, when an entity, such as a public utility, has charged illegally high rates.

[4] It did so because in *Galland*, there was not a party that overcharge consumers, but a party who was not allowed to charge enough.

[municipality] to attempt a Kavanua adjustment.") Thus, the remedy does not deter future unlawful conduct by the government. *Id.* at 1050 (Brown, J., dissenting).

Furthermore, the California majority's remedy for dealing with a municipality's due process violation is irrational. It has clearly lost sight of those citizens burdened by its own remedy. A government establishes rent control protections to ensure the availability of affordable housing. *See generally*, Elizabeth Naughton, *San Francisco Owner's Move-In Legislation: Rent Control or Out of Control*, 34 U.S.F.L.Rev. 537, 542 546 (2000)("Providing affordable housing to vulnerable members of the community" is a policy goal of rent control.); Ray Telles, *Forgotten Voices: Gentrification and Its Victims*, 3 Scholar: St. Mary's L.Rev. Minority Issues 115, 145 (2000)(Explaining that by maintaining reasonable rental prices, the reduction of affordable housing is slowed.); *Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988)("Indeed, a primary purpose of rent control is the protection of tenants."). Thus, rent control should benefit low-income families.

Low-income households in California continuously face housing pressures. California's Department of Housing & Community Developments provides:

> Given the increase in lower-income households in the State and ongoing declines in lower priced rentals, there are strong price pressures on lower priced urban rentals. . . . It is evident that renter cost burdens pose a significant problem. Statewide, more than two million households - nearly half of all renters - paid more than 30 percent of their income to housing. For poor renters, the problem is still more grim; in 1995 three

> quarters of low-income and 86 percent of very low income households in key metropolitan areas were paying more than 30 percent of their income to housing – 63 percent of low-income and nearly 80 percent of very low-income households were spending in excess of 50 percent of their income for housing.

Department of Housing & Community Development, *California's Housing Markets 1990-1997, Statewide Housing Plan Update Phase II*, at 1 (1988). These are the households on which the California Supreme Court has placed an additional financial burden by instituting a remedy that increases future rents.

Similarly, the California Supreme Court's analysis (that present and future tenants have likely benefited from the confiscatory rents) does not account for all rent-controlled tenants. It only addresses mobile home tenants. The court began its opinion by establishing that mobile home renters are "unlike the usual tenant," because they rent space for mobile homes that, once in place, are generally never moved. *Galland*, 24 Cal.4th at 1009-10. Thus, those who lease mobile home space may rent for longer periods than average residential tenants. Therefore, it is more likely they benefited from the low rents that the government imposed. However, the California majority fails to mention the turnover rates for the "usual" tenant and does not discuss how its remedy will affect the usual rent controlled tenants as a group.

If the usual rent controlled tenant does not remain in place for long periods, then the usual tenant may not have been present to benefit from the confiscatorily low rents. Increased future rents would therefore force this tenant to pay for benefits it did not receive. Hence, the California

Supreme Court has irresponsibly established a remedy based on reasoning that may only be applicable to a small subgroup of rent-controlled tenants in California.

Finally, the California majority failed to perform one of its key functions, to protect a vulnerable segment of our society. In *The Federalist No. 78*, Alexander Hamilton, while describing the importance of the judiciary to "guard the Constitution," explained that the judiciary must remain independent from the executive and legislature, and must not accept "oppressions of the minority party in the community." *The Federalist No. 78*, at 404 (Alexander Hamilton)(George W. Carey & James McClellan eds., 1990). The California Supreme Court has established a rule that does not require the government to provide any monetary compensation by allowing it to pass costs due to its own unconstitutional conduct to a minority group of its citizens (present and future rent controlled tenants).[5] This is the exact type of majority oppression that Hamilton warned against. Moreover, it is even worse because the California judiciary developed this oppressive remedy as opposed to the executive or legislature. By granting certiorari, this Court can ensure that a minority segment of society is not forced to pay the costs of the government's unconstitutional actions and "inefficient," "ill considered" procedures. *Galland*, 24 Cal.4th at 1037.

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[5] The majority population would generally support such a rule as it allows the government to retain public resources. Consequently, those officials who imposed unconstitutional confiscatory rents are not at risk when the majority once again chooses its representatives.

CONCLUSION

For these reasons, the National Association of Home Builders urge this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the California Supreme Court's *Galland* decision .

DATED: July 20, 2001

Respectfully submitted,

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